

**United States Department of Labor
Employees' Compensation Appeals Board**

M.C., Appellant

and

**DEPARTMENT OF THE INTERIOR, BUREAU
OF LAND MANAGEMENT, Las Vegas, NV,
Employer**

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**Docket No. 20-0339
Issued: August 25, 2020**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

On December 2, 2019 appellant filed a timely appeal from a June 19, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 20-0339.

On May 8, 2014 appellant, then a 40-year-old management assistant, filed an occupational disease claim (Form CA-2) alleging that she experienced extreme stress, anxiety, and feared for her safety due to the threatening and harassing emails and telephone calls received following a cattle impoundment. She stated that she was fearful of the public coming into the area where she worked, due to the lack of any protection. OWCP accepted the claim for acute stress reaction. Appellant stopped work on April 23, 2014, returned to work on July 2, 2015, and resigned from the employing establishment effective March 6, 2015. OWCP paid her wage-loss compensation on the supplemental rolls from May 4 through July 1, 2014 and from March 6, 2015 through April 30, 2016. It paid appellant wage-loss compensation on the periodic rolls beginning May 1, 2016.

On January 20, 2017 OWCP referred appellant to Dr. Sean R. Duffy, a Board-certified psychiatrist and neurologist, for second opinion evaluation regarding the extent and nature of her accepted employment-related condition. In a February 6, 2017 report, Dr. Duffy diagnosed

chronic post-traumatic stress disorder (PTSD) due to her employment and opined that she was capable of working with restrictions. The restrictions included inability to work in a social or workplace environment due to appellant's anxiety and PTSD and inability to work outside her home.¹ OWCP referred her to a vocational rehabilitation counselor who identified the position of customer complaint clerk as suitable to her work restrictions.

By decision dated January 14, 2019, OWCP issued a formal loss of wage-earning capacity (LWEC) determination based upon appellant's ability to perform the selected position of customer complaint clerk DOT No. 241.367-014. It found that the weight of the medical evidence rested with the well-rationalized opinion of Dr. Duffy, an OWCP referral physician, who indicated that she was capable of working from home.

On March 26, 2019 OWCP received appellant's request for reconsideration asserting that she was not capable of performing customer service work. Appellant submitted a March 6, 2019 report by Dr. Carmit Boldur, a psychiatrist, noting that she had difficulty concentrating and completing tasks and in maintaining and engaging in social relationships and performing effective work.

By decision dated June 19, 2019, OWCP denied appellant's request for reconsideration without conducting a merit review pursuant to 5 U.S.C. § 8128(a).

The Board finds that this case is not in posture for decision.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.² The burden of proof is on the party attempting to establish a modification of the LWEC determination.³

The Board finds that appellant's March 26, 2019 for reconsideration was, in fact, a request for modification of the January 14, 2019 LWEC determination. Appellant specifically alleged that the determination was in error as she asserted she could not perform the position of customer complaint clerk. She also submitted a March 6, 2019 report by Dr. Boldur regarding her condition. It is well established that a claimant may establish that a modification of an LWEC determination is warranted if there has been a showing that the original determination was, in fact, erroneous.⁴

¹ The Board notes that the record also contains a November 13, 2017 report from Richard Vande Voort, a treating therapist, who opined that appellant was capable of working from home and recommended on-line training.

² 20 C.F.R. § 10.511; *see C.H.*, Docket No. 19-1114 (issued April 30, 2020); *A.S.*, Docket No. 18-0370 (issued March 5, 2019); *Tamra McCauley*, 51 ECAB 375 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

³ *Id.*

⁴ *Id.* at § 10.511; *Y.R.*, Docket No. 18-1464 (issued February 22, 2019).

The Board has held that when an LWEC determination has been issued and appellant submits evidence with respect to one of the criteria for modification OWCP must evaluate the evidence to determine if modification is warranted.⁵

As OWCP improperly reviewed the case under the standard for a timely reconsideration request, the case must therefore be remanded to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding whether appellant has met her burden of proof to establish modification of the January 14, 2019 LWEC determination.⁶ The Board consequently remands the case to OWCP for proper adjudication, to be followed by a *de novo* decision.

IT IS HEREBY ORDERED THAT the decision of the June 19, 2019 Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: August 25, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

⁵ *L.P.*, Docket No. 18-1429 (March 8, 2019).

⁶ *See R.Z.*, Docket No. 17-1455 (issued February 15, 2019).